

of 1997. The Commission certainly may consider as part of that rulemaking proceeding any arguments that particular classes of pending applicants should be treated differently.

c. The U.S. Court of Appeals in the Bechtel case ordered the Commission to issue new comparative rules. Although the Commission never formally adopted such new rules, its staff, including your office, prepared draft rules to respond to the Court's order. Please summarize how those draft rules would have dealt with pending cases, and comment on whether those drafts might be suitable and readily adaptable for use in resolving at least those pending cases that had reached the point where an initial decision had been issued based on a hearing record.

The FCC staff presented a draft order to the Commission earlier this year. In that draft, the staff recommended that pending hearing cases be resolved by a lottery pursuant to section 309(i) of the Communications Act. The Balanced Budget Act of 1997 eliminated the Commission's authority to use lotteries for these cases, so the staff proposal is no longer an option.

2. Questions have been raised regarding how the General Counsel's Office has handled the well-known Asheville, N.C. case involving the Zeb Lee family and Congressman Mel Watt. It is our understanding that you have now recused yourself in this case and therefore cannot comment upon it. Some parties question your objectivity and judgment[s] in your earlier involvement in this case. To help clarify some of the troubling questions and concerns that have been raised, please answer the following questions.

a. Please describe the extent of your relationship, if any, with Congressman Mel Watt of N.C., and with former N.C. Senate candidate Harvey Gant. In particular, have you had any personal, political or business relationship with either Mr. Watt or Mr. Gant? If so, when, and what did this involve? Also, have you made political contributions to Mr. Watt or Mr. Gant or solicited political contributions for either of them, or worked for or on behalf of their earlier political campaigns for federal office?

The Biltmore Forest proceeding is an adjudicatory proceeding which is deemed a "restricted" proceeding under the FCC's ex parte rules to protect the due process rights of each of the parties to the proceeding. As you point out, I recently recused myself from this case. I did so once it became apparent that it might be raised as an issue in connection with the confirmation process. I recused myself to protect the integrity of the FCC's processes. I wanted to ensure that any future Commission action in this proceeding would not be open to charges of impropriety based on arguments by any applicant that I might have a personal interest in a particular resolution of the case because the case had been linked to the confirmation process. I believe that the appearance of propriety is essential to the proper functioning of the FCC.

I have no, and have never had any, personal or business relationship with Congressman Watt or Mr. Gant. I have never met Congressman Watt or Mr. Gant, nor have I had any communications with them, either directly or through intermediaries. I do not recall making any political contributions to either of them, nor have I worked for or on their behalf in connection with any political campaign. In the past, I have made contributions to political action committees that may have made political contributions to the campaigns of Congressman Watt or Mr. Gant. However, any such contributions would not have been made at my direction or with my knowledge.

b. Has Mr. Watt or Mr. Gant ever contacted you regarding the Asheville area station application filed by Mr. Watt and several of his associates? If so, when, and what was the nature of that communication?

I have never received any contact from Congressman Watt or Mr. Gant regarding the Biltmore Forest proceeding, either directly or through intermediaries. Indeed, I was not even aware that Mr. Watt or his associates had any interest in the Biltmore Forest proceeding until I read an article about the proceeding in the May 5, 1997 edition of Media Week, a trade publication. This occurred well after the Commission decisions in the case.

c. Were you ever contacted on this case by FCC Chairman Re[e]d Hundt, or by Blair Levin[] on his staff? If so, please describe fully the nature and substance of any such contacts. Also, do you know if Mr. Levin[] knows Congressman Watt?

I have never discussed this case with Chairman Hundt. The first time I discussed this case with Mr. Levin was in June, 1997, after I read an article about the case in the May 5, 1997 edition of Media Week. We discussed many significant inaccuracies in the article and made plans to direct FCC staff to call the Media Week reporter to alert her about the inaccuracies in the article. I do not know whether Mr. Levin knows Congressman Watt.

The extent of my involvement in the Biltmore Forest proceeding has been to provide legal advice to the Commissioners. The FCC's Office of General Counsel analyzed the legal issues involved in the case and advised the Commissioners on the legal risks involved in the course of action recommended by the Chief of the FCC's Mass Media Bureau. I accepted the legal analysis presented to me by the FCC's career staff.

d. Please provide this Committee with a copy of any case summary or recommendation that was represented by your Office to the Commission for its consideration prior to the Commission's vote on its opinion and order adopted November 7, 1995 that reversed the Commission's staff and rescinded the station construction permit that had been issued to the Lee family (Orion Communications).

Memoranda provided by the FCC staff to the Commissioners are privileged communications under the Commission's rules. I do not have authorization to release the documents that you have requested. To assist you in your review of this case, however, I

can describe the documents that fall within the scope of your request. I am aware of two such documents, each of which was sent to the Commissioners by the Chief of the Mass Media Bureau. The Office of General Counsel did not send any independent recommendations to the Commissioners regarding this case.

On August 21, 1995, the Chief of the Mass Media Bureau sent a memorandum to the Commissioners recommending that the Commission overturn the Bureau's prior decision permitting Mr. Lee's company to retain the construction permit for the FM station. I "noted" this memorandum as General Counsel, which indicates that I agreed with the Bureau's analysis in the memorandum regarding litigation risks. The memorandum states that there would be substantial litigation risks on appeal if the Commission did not rescind the construction permit held by Mr. Lee's company as requested by the other applicants. The Commission unanimously adopted the Bureau's recommendation.

The second document is a memorandum dated July 18, 1996 to the Commissioners from the Chief of the Mass Media Bureau recommending that the Commission affirm its unanimous November, 1995 order. This recommendation led to an October, 1996 unanimous order by the Commission affirming its prior order. I also "noted" this memorandum from the Bureau Chief, which again indicated that the General Counsel concurred with the Bureau's assessment that the Commission would be exposed to greater litigation risk by permitting Mr. Lee's company to retain the construction permit than it would by granting the petition of the competing applicants.

These are the only staff recommendations, summaries or other memoranda to the Commission regarding this matter of which I am aware. In February, 1997, the D.C. Circuit (Judges Ginsburg, Sentelle and Henderson) denied a request by Orion to stay the Commission's decision in the Biltmore Forest proceeding. The court heard oral argument in September, 1997, and the matter is pending before the court.

Helms vows to block FCC nomination

THE ASSOCIATED PRESS

An Asheville broadcaster will get back on the air if Sen. Jesse Helms, R-N.C., has his way.

Helms has vowed to keep William Kennard from becoming the new chairman of the Federal Communications Commission unless Kennard helps broadcaster Zeb Lee get the new FM radio license he's been seeking for the last decade.

The Senate Commerce Committee is expected to vote on Kennard's nomination and those of three FCC commissioners today. As a senator, Helms can put a hold on any nominee's confirmation and has shown repeatedly he's willing to do so. Most recently, he refused to hold confirmation hearings for William Weld's nomination as ambassador to Mexico.

On Monday, Kennard sent Helms a written explanation of why the Lee family lost its effort to run the new 96.5 FM. Kennard now works as the FCC's general counsel and helped make the decision that took Lee off the air.

The Lee family argued they won the right to a new station in 1990

and the FCC then reversed course and kicked it off the air this June in favor of a group of investors that included Rep. Mel Watt, D-N.C.

"I'm certainly grateful for any help anybody wants to bestow upon us," Brian Lee, Zeb Lee's son and a station manager, said of any politicking for the family's cause. "We've been feeling pretty beleaguered for the last 10 1/2 years."

But an attorney for the investor group the FCC ultimately chose said Helms' pressure on Kennard may hurt the Lee family's cause.

"To bring Mr. Kennard into this — to use his nomination as leverage — is wrong," said lawyer Stephen Yelverton. "Now if the FCC changes its decision, their motive would be suspect."

Helms' office gave a list of seven questions for Kennard to answer about his office's handling of the Asheville case. The government-sanctioned license — which Watt's group is now operating under the name Biltmore Forest Radio Inc. — is worth an estimated \$3 million to \$6 million.

*Greenville S.C. paper
Oct. 8, 1997*

Charlotte Observer OCT 7, 1997

FCC nominee, Helms face off over licensee

By CAROL D. LEONING
Observer Washington Bureau

WASHINGTON — Sen. Jesse Helms, R-N.C., plans to use his now-famous blinking camera to help a longtime Asheville broadcaster get back on the air.

Helms has vowed to keep William Kennard from becoming the new chairman of the Federal Communications Commission unless Kennard helps broadcaster Zeb Lee get the new FM radio license he's been seeking for the last decade.

On Monday, Kennard sent Helms a written explanation of why the Lee family lost their shot at running the new 96.5 FM, but it appeared to do little to allay the senator's key concerns. Kennard now works as the FCC's general counsel and helped make the decision that took Lee off the air.

The Lee family argues they won the right to a new station in 1990 and the FCC then reversed course and kicked them off the air this June — in favor of a group of investors that included Rep. Mel Watt, D-N.C.

"I'm certainly grateful for any help anybody wants to bestow upon us," Brian Lee, Zeb Lee's son and a station manager, said of any politicking for the family's cause. "We've been feeling pretty beleaguered for the last 10½ years."

But an attorney for the investor Watt group the FCC ultimately chose said Helms' muscle-flexing is improper — and his pressure on Kennard may hurt the Lee family's cause. As a senator, Helms



Helms



Helms may tie up nomination over Asheville license decision

FCC

Continued from page 1C

can put a hold on any nominee's confirmation.

"To bring Mr. Kennard into this — to use his nomination as leverage — is wrong," said lawyer Robert Helms. "If the FCC changes its decision, their motive would be suspect."

Helms' office gave a list a seven questions for Kennard to answer about his office's handling of the Asheville case. The government-sanctioned license — which Watt's group is now operating under the name Biltmore Forest Radio Inc. — is worth an estimated \$3 to \$6 million.

Kennard returned four pages of answers Monday, explaining that the FCC never promised the Lees a permanent license. He said Lee's group may have been judged the most experienced and thus the top choice in 1990, but a 1993 federal court ruling threw out as unfair the commission's standards for making that and other licensing decisions.

But Steve Leckar, an attorney for the Lees, said the court ruling didn't force the FCC to switch its course — only to review its deci-

sions on new merits. He disagreed with Yelverton that Helms' pressure would lead to an unfair decision.

"Kennard would be righting a wrong — not just for the Lee family but for others," he said. "It's wrong to have people invest years of their life and have relied the fruits of their labors snatched away by arbitrary decision-making."

Kennard declined comment, but referred questions to his written statement.

By advocating for the Lee family, Helms is in the unusual position of lobbying against the monetary interests of a fellow Congress member from North Carolina. Watt invested with several Charlotte law partners at Ferguson, Stein, Watt, Wallas and Adkins in a speculative group applying for the station license in 1987, before he was elected to Congress. The group later merged with three others to become the Biltmore Forest group.

Watt was out of the country on a congressional trip Monday and couldn't be reached for comment. In the past, he has said he is merely an investor who stays away from the day-to-day business of the station.

Please see FCC / page 4C

Sen. Helms applies pressure to help WZLS

By Mark Barrett
STAFF WRITER

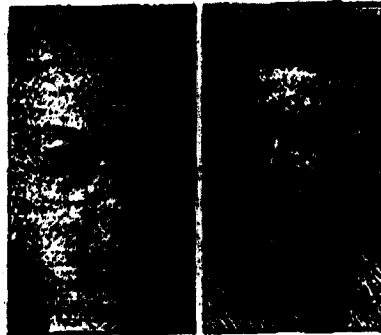
U.S. Sen. Jesse Helms is trying to get local broadcaster Zeb Lee and his rock music station back on the air, reportedly threatening to block a vote on a Clinton Administration nomination unless the nominee helps Lee.

The nominee is William Kennard, who would become chairman of the Federal Communications Commission. Kennard is currently the FCC's general counsel - in other words, its chief lawyer - and participated in decisions that helped remove Lee's WZLS-FM from local airwaves in June.

Helms has vowed to keep Kennard from becoming the FCC chairman without some action by Kennard regarding the Lee case, the Associated Press reported Tuesday.

As a senator, Helms can put a hold on any nominee's confirmation. Such holds can last indefinitely and can be broken at the discretion of the Senate majority leader.

A company owned by Lee and his family and four other companies have been fighting for control of the right to broadcast on the 96.5 FM frequency for more than 10 years. The FCC at first chose the Lees as the most qualified applicants, then invited all the applicants to operate on the frequency jointly after an appellate court struck down the FCC's method of choosing among applicants.



Sen. Jesse Helms

Brian Lee

The Lees declined, the other companies agreed and a station they jointly own, WZRQ, took over the frequency temporarily June 2.

Kennard and a spokesman could not be reached for comment Tuesday.

A Washington, D.C., attorney for the companies competing with the Lees for control of the station said anything Kennard did for the Lees would be immediately suspect and subject to a court challenge.

"This whole thing has gotten out of control. It's been politicized and the process has been tainted and corrupted," said attorney Stephen Yelverton.

Brian Lee, WZLS's station manager, said Kennard should reconsider earlier FCC actions.

"There's been a great injustice perpetrated on me and my family and our employees and the people of Asheville. Anything (Kennard) could do to right that we would welcome."

Asheville Citizen-Times

Wed., Oct. 8

EDITORIAL

Helms puts focus on local radio controversy



Sen. Jesse Helms has announced he wants to come to the rescue of long-time Asheville radio broadcaster Zeb Lee. To do so,

he plans to block the confirmation today of William Kennard as new chairman of the Federal Communications Commission.

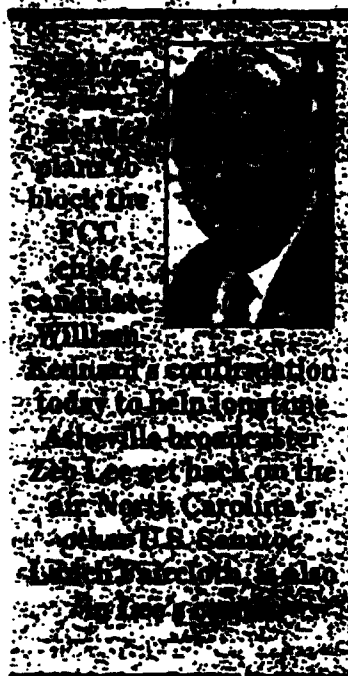
Kennard works as general counsel to the FCC and helped to make the decision that forced Lee off the air in June. Lee has contended the FCC unfairly denied him the license because the FCC already had said in 1990 he could broadcast at 96.5 FM. The license now has gone to a group of investors that includes U.S. Rep. Mel Watt, D-N.C.

How does Kennard get back in Helms' good graces? He must help Lee get the FM radio license he has sought for the past 10 years.

The license is worth \$3 million to \$6 million.

The 96.5 FM license is one of about 60 nationwide in limbo because of confusion over the FCC's license-granting process.

A new law stipulates frequencies still involved in these disputes next year will go up for



auction.

North Carolina's other U.S. Senator, Lauch Faircloth, has also weighed in on the matter, saying he would push for a legislative solution to the frequency controversy if needed.

Lee deserves a fair hearing from the FCC in this matter. And Helms' strong-arm tactics have gotten Kennard's attention.

Wed. Oct. 6, 1997

Asheville Citizen-Times

**Winston-Salem Journal,
on Sen. Jesse Helms' tactics:**

After blocking William Weld's nomination as ambassador to Mexico, Sen. Jesse Helms threatened to hold up the nomination of William Kennard as chairman of the Federal Communications Commission unless Kennard helps Asheville broadcaster Zeh Lee get a new FM radio license worth an estimated \$3 million to \$5 million.

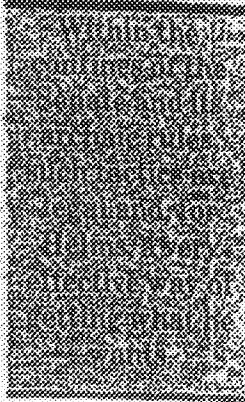
As a senator, Helms can block any nominee's confirmation on the floor as long as he is supported by the Senate's leadership—and he has repeatedly shown his willingness to do so.

In what was described as a "very, very cordial meeting," Helms apparently got what he wanted from Kennard, and the nomination will proceed.

When such means of persuasion are used outside the Senate, the process is known as extortion. However, within the confines of the Senate and its archaic rules, such tactics are legal and, for Helms, a very effective way of getting what he wants.

It has gotten to the point that every federal nominee needing Senate confirmation must report, hat in hand, to Helms.

No single senator should be so powerful that he can block the business of an entire federal agency to benefit one individual from his home state.



Sunday

Oct. 29, 1997

Asheville

Citizen-Times

Senator Stevens, Senator Knowlton, Senator Hiram, and others about Mr. Kennard's ability and willingness to re-examine and change policies of the FCC that we believe misinterpret the law and harm consumers. These concerns are only heightened by the very public way in which the administration has sought to involve itself in the deliberations of this supposedly independent regulatory agency.

Obviously, I do not agree with Mr. Kennard on many issues. For example, he believes that the FCC can and should tell broadcasters what kinds of programming they must present. I vehemently disagree. He believes that the FCC's current policies on telephone competition are working. I vehemently disagree. I am also troubled by the fact that, when asked, he was unable to specify any particular issues with which he might have disagreed with the FCC's current chairman—despite the fact that the FCC had disposed of thousands and thousands of issues during his tenure as its general counsel. That did not bode well for the independence of his approach to governing the FCC.

Mr. President, I am going to vote in favor of his confirmation, and I will tell you why. Mr. Kennard has an unblemished reputation for intelligence and integrity, and I find him to be an individual with whom I believe we can work in an atmosphere of mutual candor and respect.

In the final analysis, Mr. President, I believe it is neither reasonable nor necessary that all members of the Senate endorse the current policies of the FCC or Mr. Kennard's personal policy predictions. It is much more important that the Senate understand how difficult the issues are that Mr. Kennard is going to be called upon to decide, and that we undertake to work closely and collaboratively with him in resolving them. I give you my promise, as chairman of the Commerce Committee, to exercise the committee's oversight responsibility exactly and continuously, and I know the members of the committee are as committed to this task as I am.

On this basis, Mr. President, I am pleased to support the confirmation of William E. Kennard as Chairman of the Federal Communications Commission.

Mr. President, I reserve the balance of my time.

Mrs. FEINSTEIN addressed the Chair.

The ACTING PRESIDENT pro tempore. The Senator from California is recognized.

Mrs. FEINSTEIN. I thank the Chair.

The ACTING PRESIDENT pro tempore. Who yields time to the Senator? Mr. HOLLINGS. Mr. President, I yield such time as is necessary to the distinguished Senator from California.

The ACTING PRESIDENT pro tempore. The Senator from California is recognized.

Mrs. FEINSTEIN. Mr. President, I thank the ranking member of the committee and I also thank the chairman of the committee.

I was very pleased to hear the chairman's statement that it is his belief that Mr. Kennard possesses an "unblemished reputation" for candor and integrity. I appreciate his comments and believe they have been well stated.

As California's Senator, I am particularly pleased to rise in support of the President's nomination.

Bill Kennard has very strong California roots. He was born in Los Angeles. He graduated with honors from my alma mater, Stanford University. He then attended Yale Law School.

Bill Kennard's family also has strong California roots. His father, Robert Kennard, now deceased, was a very well-regarded architect in the Los Angeles area. He formed the largest continuously operating African-American architectural practice in the western United States and also served as the founding member of the National Organization of Minority Architects.

His mother, I want this body to know, is also a distinguished person. She grew up in the great Central Valley of California. She received a master's degree in bilingual education and has worked in the field of bilingual education in Los Angeles.

The President's nomination is, in fact, a historic one. Following his confirmation, he will be the first African-American to serve as FCC Commissioner in the history of the United States. He is well prepared for the challenges ahead of him. He has a broad telecommunications background in both the public and the private sector and an impressive range of experiences that, I believe, will serve him well and serve the Nation well.

Since 1993, as the chairman mentioned, Bill Kennard has served as FCC general counsel. He has represented the Commission before the courts and served as its principal legal advisor. In that capacity, he has defended the commission well.

Bill Kennard was a partner in the Washington law firm of Verner, Lipfert, Bernhard, McPherson & Hand, specializing in communications law. He has served as assistant general counsel of the National Association of Broadcasters.

I also know that he has been involved in the needs of his community here in Washington and has served on the board of a nonprofit homeless shelter.

With this committee's leadership, the Congress was able to pass the most comprehensive communications legislation since passage of the 1934 Communications Act, upgrading our telecommunications law to address modern telecommunications needs.

The 1996 act sought to develop a regulatory framework that provides the benefit of competition for consumers, spurs the development of new products and reduces costs, while it also removes unnecessary regulatory barriers.

Congress has set the stage for a new telecommunications era, and we need to ensure that that law is implemented properly and that it works fairly for

consumers. I think that, as FCC general counsel, Bill Kennard has the experience to help see these reforms through.

I happen to believe he will be an independent and a strong voice, yet responsive to the concerns that the distinguished chairman has pointed out. I am pleased to add a California voice and to support this distinguished nominee.

I thank the Chair and I yield the floor.

Mr. HELMS addressed the Chair.

The ACTING PRESIDENT pro tempore. The Senator from North Carolina is recognized for 5 minutes.

Mr. HELMS. I thank the Chair and I thank the managers of the bill.

Mr. President, we have been working with Senator McCain and Senator Hollings and their staffs and, of course, William Kennard. I met with him for some time in my office. Mr. Kennard is the nominee to be Chairman of the Federal Communications Commission, as you know. Now, all of us—and I think it is fair to include Mr. Kennard—want to rectify an awkward and undesirable situation that has developed in the Federal Communications Commission process of awarding broadcast licenses. Specifically, in this case, a well-known and highly respected and popular broadcasting executive in Asheville, NC, was curiously disqualified in his application for an FM frequency in the Asheville area. There was a lot of resentment in the public about that.

What happened, Mr. President, was that this gentleman, Bob Lee, of Asheville, and 12 other groups, had applied for the FM frequency when it became available in 1967. The Commission's comparative hearing process, in effect at that time, was used to determine which group would be the most qualified for the frequency.

Bob Lee had run station WKEY-AM in Asheville for 46 years, during which time he did the play-by-play for about 4,000 high school football games, and by sponsoring such public interest things as an Elvis Presley concert in 1955, which I would not have listened to, but most people did want to hear it. But he made so many innovations in broadcasting that he became just a household word, in terms of his name. He is enormously popular to this day.

Well, Mr. President, in 1988, a 20-day hearing was held during which an FCC administrative law judge disqualified most of the other applicants because the judge ruled that they either lacked experience, didn't have transmitter facilities ready to go, or were basing their application purely on provisions favoring minorities—women and others. The judge found for the Lees, ruling in their favor on May 4, 1990. The judge found that the Lees were the most qualified, citing their stewardship of the AM station and Mr. Lee's commitment of involvement in the day-to-day management of the station. The FCC then favored active involvement by owners in the day-to-day operations

of a radio station, as opposed to passive investors who would not be active managers. I think that is the way to go, as a former broadcaster.

In any case, Mr. President, in addition to the first ruling in favor of *Eab Lee* and his people, on April 8, 1961, the FCC Review Board affirmed the administrative law judge's ruling. And then on February 28, 1962, the FCC released its first decision favoring the *Lee* and a second decision also favoring the *Eab Lee* application was released, I believe, on November 21, 1962.

So on June 14, 1963, the FCC released a third ruling favoring the *Lee*.

Well, Mr. President, you might say, "Why is *HELM* going to speak today talking about this sentence and this situation in Asheville, NC?"

The FCC granted a construction permit to the *Lee* on April 30, 1962, following which they began the construction process. So it went through a series of regulatory twist and turns in which the *Lee* complied with every order and requirement issued by the FCC and the administrative law judge, who stipulated that Mr. *Lee* must dispose of his AM station as a condition for acquiring that FM license—which Mr. *Lee* did. Amazingly, on June 18 of this year, the FCC which had reversed itself on June 1, forced the *Lee* off the air.

Eab Lee has asked the U.S. Court of Appeals to examine the manner in which the FCC handled his application, which led to his being taken off the air. The court will shortly issue a decision in the near future.

Mr. President since April 30, 1961, the U.S. Court of Appeals in the *Bechtel* case of December 17, 1963, struck down the "comparative process" that had been used to determine allocations of radio and television frequencies. The court directed the FCC to come up with new comparative standards. The *Lee* and about 25 to 30 other people were affected by this decision.

But their cases have been frozen ever since. Additionally, a provision in the Balanced Budget Act of 1967, which went into effect July 1, required that all radio and television frequencies be subject to auction. This provision concerned me because *Eab Lee's* case and another 25 to 30 cases were in the pipeline and could be subject to auction, which nobody anticipated.

I find no fault with the provision in the balanced budget legislation, but it crept in the back door on Mr. *Lee* and the others.

So, to get to the meat of the contest, Mr. President, I submitted questions to Mr. Kennard through Senator *Burke's* Commerce Communications Subcommittee about all of this. I ask unanimous consent that the nominee's responses be printed in the RECORD at the conclusion of my remarks.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

(See exhibit 1.)

Mr. *HELM*. I thank the Chair.

Senators should note that Mr. Kennard clearly feels the FCC can conduct hearings on this small group and class of applicants using new comparative criteria.

In any event, Mr. President, I then consulted and wrote to the able chairman of the Senate Commerce, Science, and Transportation Committee, Mr. *McClure*, seeking assurance that Senator *McClure* now agrees that the provisions in the Balanced Budget Act of 1967 do not prohibit the FCC from using the comparative process in these 25 or 30 cases.

I ask unanimous consent that copies of my letter and Senator *McClure's* response be printed in the RECORD at the conclusion of my remarks.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

(See exhibit 2.)

Mr. *HELM*. I thank the Chair.

Mr. President, I have been given assurances satisfactory to me by Mr. Kennard that he will, within statute and regulation, work in good faith with me and others to resolve the problems the *Bechtel* decision caused.

I was very impressed when Mr. Kennard came to my office and met with me about 8 weeks ago. I appreciate his voluntary assurance that he will work with us on the *Eab Lee* case. Therefore, Mr. President, I support the nomination, and I am going to ask for the yeas and nays. I hope that he will be confirmed unanimously by the Senate.

EXHIBIT 1

RESPONSE OF WILLIAM E. KENNARD TO POST-HEARING QUESTIONS SUBMITTED BY SENATOR DONALD BURKE ON BEHALF OF SENATOR JAMES HELM

1. As you know, the recent budget legislation included a provision that appeared to require the FCC to apply auction procedures to pending applications for radio stations. These provisions were reportedly aimed at resolving the applications that have been in limbo since the *Bechtel* case struck down a part of the FCC's rules governing comparative license application proceedings. Please clearly state your views in response to the following questions:

a. In your opinion, is the FCC now required to apply these auction provisions to all pending application cases, or does the FCC have discretionary authority not to handle pending cases through this auction approach?

In the Balanced Budget Act of 1967, Congress required the FCC to use auctions to resolve all future comparative broadcast proceedings involving commercial stations. For pending applications, the statute states that the Commission "shall have the authority" to use auctions. The Conference Report states that this provision "requires" the Commission to use auctions for pending cases. The Commission will be determining in a rulemaking proceeding implementing the Balanced Budget Act of 1967 how it should proceed with these pending cases. The statutory language suggests that the Commission has discretion to use comparative proceedings for pending cases.

b. While most of the pending comparative cases had not gone through a hearing before an administrative law judge, and had at least an initial decision issued, a relatively small number of these cases had in fact been de-

cided under the old rules by an ALJ and in some cases decisions made by the full Commission, although these decisions may have been on appeal. In these cases, the parties often had spent many years and hundreds of thousands of dollars to advance their applications under the old rules. Do you believe that it would be more equitable not to apply auction procedures in the cases which were far along in the process, where the applicants had played in good faith under the old rules, and to instead have these cases decided using any existing hearing record pursuant to such special rules as the Commission might adopt for deciding them?

I do believe that the *Bechtel* decision has caused unfairness to many applicants who have had further processing of their applications delayed and, as a result of that court decision, will necessarily have their applications processed under new procedures. I am quite sympathetic to their predicament. That is why the Commission agreed to the court in *Bechtel* that the court's decision should only apply to new cases. Unfortunately the Commission was not successful and the court rejected this argument. As noted above, the issue of what those procedures will be, that is, whether some or all pending applications should be auctioned or decided pursuant to some new, yet-to-be-developed criteria, will be a subject of the Commission's rulemaking proceeding implementing the Balanced Budget Act of 1967. The Commission certainly may consider as part of that rulemaking proceeding any arguments that particular classes of pending applicants should be treated differently.

c. The U.S. Court of Appeals in the *Bechtel* case ordered the Commission to issue new comparative rules. Although the Commission never formally adopted such new rules, its staff, including your office, prepared draft rules in response to the Court's order. Please summarize how these draft rules would have dealt with pending cases, and comment on whether these drafts might be suitable and readily adaptable for use in resolving at least those pending cases that had reached the point where an initial decision had been issued based on a hearing record.

The FCC staff presented a draft order to the Commission earlier this year. In that draft, the staff recommended that pending hearing cases be resolved by a lottery pursuant to Section 309(i) of the Communications Act. The Balanced Budget Act of 1967 eliminated the Commission's authority to use lotteries for these cases, so the staff proposal is no longer an option.

EXHIBIT 2

U.S. SENATE,

Washington, DC, October 21, 1967.

SEN. JERRY MCCART, Chairman, Senate Committee on Commerce, Science, and Transportation, Washington, DC.

DEAR JERRY: My folks have conducted numerous discussions with your good people about the FCC treatment of *Eab Lee*, a long-time Asheville broadcaster, in response to *Lee's* attempt to secure an FM radio station. (*Eab* and approximately 25 to 30 other applicants were left stranded in the regulatory process by the *Bechtel* court decision.)

Additionally, I understood these 25 to 30 applicants are not affected by the provision requiring the auctioning of all radio and television licenses that was included in the Balanced Budget Act of 1967, which went into effect July 1 of this year.

The FCC contends that it interprets this provision as giving the Commission the authority to decide whether these 25 to 30 applicants be judged on the basis of the comparative hearing process. John, I do hope that you agree that this is a proper interpretation.

Furthermore, in the event if the courts question this interpretation for these applications, I do hope that you will reaffirm this interpretation and move related legislation swiftly through the Senate.

Many thanks, John.

Sincerely,

U.S. SENATE, COMMITTEE ON
COMMERCE, SCIENCE, AND
TRANSPORTATION

Washington, DC, October 22, 1997.

Hon. JOHN HELMS,

U.S. Senator,

Washington, DC.

Dear JOHN: I am aware of your concern over whether Section 303(a) of the National Budget Act would permit the Federal Communications Commission to use comparative hearings where mutually-exclusive applications have been filed for initial licenses or construction permits for commercial radio and television stations. As a principal proponent of this part of the legislation, I am happy to have the opportunity to respond to your question.

Section 303(a) specifically states that, with respect to competing applications filed before July 1, 1997, the Commission "shall have the authority to conduct" hearings. Therefore, the Commission's authority to conduct hearings in these situations is clearly and explicitly permissive, not mandatory. Moreover, the statute contains no provision affecting the Commission's existing authority to hold comparative hearings, although it does explicitly repeal the Commission's authority to conduct hearings. Read together under long-established principles of statutory interpretation, there can be no doubt that these provisions: (1) permit, but do not require, the use of auctions to select initial licenses for commercial radio and television stations; and (2) that the Commission is (a) permitted, but not required, to use comparative hearings to select such licenses or permits in cases where it determines that auctions should not be used, but (b) is not permitted to use lotteries to select licenses or permits for any service.

As to the impact of legislative history (conference reports, floor statements, and other such collateral materials), it is a basic tenet of statutory interpretation that when, as here, the letter of the law is unambiguous on its face, legislative history cannot be used to override it. Therefore, any such statements that appear inconsistent with the clear terms of the statute cannot be interpreted to contradict it or to call it into question.

Finally, in the unlikely event that any future court opinion undermines the statute, I will do whatever is necessary to secure the passage of legislation that will restore the terms of the statute as reflected in this letter.

I sincerely trust this will answer your questions fully. I would be pleased to provide you with anything further you might wish on this issue at any time you feel it would be helpful.

Sincerely,

JOHN MCCAIN,
Chairman.

Mr. HELMS, Mr. President, if it is in order and agreeable to the manager of this nomination, I ask for the yeas and nays.

The ACTING PRESIDENT pro tempore: Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

Mr. HELMS. I thank the Chair. I thank the manager.

I yield the floor.

Mr. MCCAIN addressed the Chair.

The ACTING PRESIDENT pro tempore: For the information of the Senator from Arizona, he has about 24 minutes.

Mr. MCCAIN. Thank you, Mr. President.

Mr. President, I thank the Senator from North Carolina for his cooperation on what is a very important issue with one of his constituents, and one of great importance to him. I am grateful for his cooperation and that of his staff in receiving it.

I reserve the remainder of my time.

Mr. MOSELEY-BRAUN. Mr. President, I strongly support the nomination of William Kennard to serve as Chairman of the Federal Communications Commission, and I urge all of my colleagues to do the same.

There is perhaps no industry that has undergone more rapid or greater change than the telecommunications industry. In terms of technology, ownership, and opportunities, the communications industry has literally undergone a revolution. These changes will create opportunities for consumers, existing companies, and new entrants. In the coming years, the FCC will face enormous challenges as it attempts to cope with these changes and finishes implementing the provisions of the Telecommunications Act of 1996.

No one is more prepared for that challenge than Bill Kennard. He has demonstrated exceptional leadership and mastery of the issues during his 4 years as general counsel of the FCC, and his many years as a telecommunications lawyer. When I think of Mr. Kennard, I think of something that Jean-Claude Paye, former Secretary General of the Organization for Economic Cooperation and Development, said of the changing times in which we live. He said that societies concerned about their economies ought to look to their fraying social fabric, as economic growth is the weave of national character. The warp of it, he said, are the people who embrace and master social change.

Bill Kennard is one of those individuals. He will bring to the helm of the FCC not only an understanding of the industry and the economics, but the social and societal implications of the issues that he will address as Chairman of the FCC.

Mr. President, I expect great things from Bill Kennard and I look forward to working closely with him as he steers the telecommunications industry into the 21st century. I commend the President for choosing such a qualified and competent individual for this duty, and I hope that every one of my colleagues will support his nomination.

I thank the managers of this nomination, and I yield the floor.

Mr. HUTCHINSON. Mr. President, I rise today in support of the nomination of William E. Kennard to the Federal Communications Commission (FCC).

The telecommunications industry has seen incredible technological advances made over the last two decades. As a result, the responsibilities and scope of the FCC have increased dramatically. Today, it is more important than ever for FCC Commissioners to be able to respond and adapt to these changes in a timely manner.

Recently, the FCC issued a regulation that will have a profound impact on the trucking industry nationwide. While ordinarily one would not think of an FCC action having an adverse impact on trucking companies, such is not the case in this situation. On October 2, the FCC issued a regulation implementing a provision of last year's Telecommunications Act, which directed the FCC to provide for adequate compensation of pay phone operators. The new FCC regulation ordered long-distance companies to pay payphone owners 28.4 cents per call for each call to a toll-free number unless the payphone owner and the long-distance company have a contract specifying a different rate. The charge applies to both customer toll-free numbers and to company access numbers, including those on prepaid calling cards. The charge became effective immediately.

Long-distance carriers, in turn, are passing this charge along to their customers. The carriers are not limited to a set charge and as a result the amount being charged varies depending on the carrier.

Pay phones are the life line between the Nation's 2.5 million truck drivers and their home offices. A driver will call in numerous times during the day and in most cases will talk no longer than 2 minutes. Nevertheless, under this new rule, the trucking company will be charged each time a driver calls in.

Arkansas has been fortunate to have a significant trucking industry based in our State. Some of the largest trucking companies in the Nation are headquartered there. This new regulation will have a devastating effect on their business costs. For instance, in the case of J.H. Hunt Trucking, it is estimated that this new regulation will increase the company's phone bill by approximately \$200,000 a month. This will equate to \$2.1 million annually.

Smaller trucking firms have also contacted me and said their phone bills are projected to double under this new rule. A small business is completely unable to absorb an increase of this magnitude.

When it comes to using payphones, the trucking industry is virtually a captive consumer. There is no real alternative and no option to avoid paying what is, in effect, a very expensive tax.

Mr. President, we need to explore alternatives to provide some relief to this industry. I will be contacting the FCC Commissioners to work with them on this problem and I would encourage my colleagues to do the same.

The ACTING PRESIDENT pro tempore: Who requests time?

Helms convinces new FCC head to work on WZLS radio case

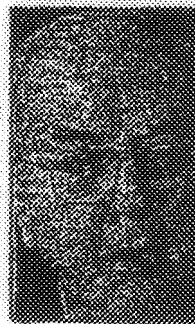
By Mark Barrett
STAFF WRITER

The U.S. Senate approved William Kennard as chairman of the Federal Communications Commission on a 99-1 vote Wednesday after he agreed to attempt to resolve a dispute over a radio frequency serving the Asheville area.

U.S. Sen. Jesse Helms, R-N.C., told the Senate Kennard had given Helms his "voluntary assurance that he will work with me on the Zeb Lee case." The FCC forced a rock music station WZLS-FM, owned by Lee and his family, off the air in June following a lengthy legal battle.

Kennard apparently did not and

likely could not promise to put WZLS back on the air. His options in handling the matter could be constrained by a pending court decision, and any actions Kennard proposes would have to be approved by at least two other FCC commissioners.



Sen. Helms

most qualified applicant. But a 1993 court decision struck down the

FCC's method of choosing among competing applicants. The FCC has never adopted a new method, and it later gave temporary rights to the 96.5 frequency to a consortium of four companies competing against Lee.

That group currently operates WZHQ-FM on the frequency.

According to Helms, Kennard has said, "he will (within statute and regulation) work in good faith with me to resolve the problems the (1993) decision caused."

About 25 or 30 other cases were also affected by the 1993 decision. Kennard's assurances basically mean he will attempt to find a meth-

♦ See WZLS on page 35

Helms clears way for FCC chief's approval

By CAROL B. LEWIS

Observer Washington Bureau
WASHINGTON — A longtime Asheville broadcaster Wednesday said what he hopes is a better shot at getting a radio station license after Sen. James Helms intervened on his side.

Helms publicly dropped his opposition to William Kennard's nomination as Federal Communications Commission chairman, and that cleared the way for the Senate to confirm Kennard for the job a few hours later.

The senator said he was willing to endorse Kennard after the nomi-

one assured him that the FCC would evaluate Zeh Lee's application for an Asheville FM station under a no-longer-used set of competitive criteria, rather than auctioning off the license to the highest bidder.

"All of us, and I think it's fair to include Mr. Kennard, want to rectify an awkward and unjustifiable situation that has developed in the FCC process," said Helms, R-N.C. "I have been given assurances satisfactory to me by Mr. Kennard that he will work in good faith with me to resolve the problems."

Lee believes he has a better shot at winning the license in an open competition that measures expertise and community involvement against the other applicant — a

group of speculative investors with little radio experience, whose members include Rep. Mel Watt, D-M.C., of Charlotte. Lee's attorneys said he would have a hard time raising the \$3 million that some estimate as the going price of the license.

From 1960 on, the FCC repeatedly told Lee he was the most qualified and experienced applicant for the new license, but reversed its decision and in June temporarily granted the license to the investor group, a merger of several applicants known as WBS more Forest.

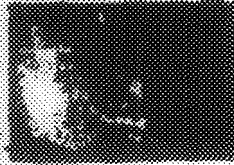
Kennard, who had been the FCC's general counsel, overruled the decision that this summer took Lee off the air.

Lee has argued that the FCC unfairly changed the rules of the competition because of an unrelated court decision that questioned some of its judging criteria.

"We've planned Senator Helms has clarified the situation," said Wright Anderson, one of Lee's attorneys. "We had now that Mr. Lee will get a fair shot in the competition."

Attorneys for the investors could not be reached for comment. But they have previously threatened to sue in court that the FCC had had its decision-making totally influenced by forces outside the contest — namely Helms' senatorial presence.

Ching his pending nomination, Kennard has declined to discuss the matter.



ing broadcast licenses up for auction, said Helms aide Wayne Boyles.

Congress passed legislation earlier this year authorizing the FCC to award broadcast licenses to the highest bidder. But Helms obtained a letter from bill author U.S. Sen. John McCain, R-Ariz., saying the legislation does not require an auction in old cases like Lee's.

Kennard had said earlier he interprets the law as giving the FCC the option of holding an auction in old cases, but does not mandate them.

Just how the matter is resolved will depend in large part on how the District of Columbia U.S. Court of Appeals decides an appeal Lee's company has made of the FCC actions, Boyles said.

The court heard oral arguments in the case last month but has not issued a decision.

Kennard, the FCC's first black chairman, and three other new commissioners now have the daunting task of giving Americans the wider choice of telephone and cable television services promised in a 1986 law deregulating the industry.

"I will continue the FCC's efforts to replace regulation with competition and to hasten the delivery of many new telecommunications services to the public," Kennard said in a statement after the vote. "In doing so we will strive to provide quality telecommunications services at the best price to American consumers."

On Tuesday, the Senate approved three new commissioners to the five-member panel: Republicans Harold Furchtgott-Roth and Michael Powell and Democrat Gloria Tristani.

They join holdover commissioner Susan Ness, a Democrat.

All four incoming members will soon take office but a specific date has not been set, FCC officials said.

At Senate hearings several weeks ago, Kennard and the three other incoming commissioners said they want to speed the snail-like pace of local phone and cable competition to offer customers the same wide choices they now have in long distance. But they didn't say how they would accomplish that.

Local and long-distance companies, which want to get into each other's business, accuse one another of trying to forestall competition. Cable companies, which initially had offered a grand vision of delivering local phone services on a wide-spread basis, have scaled back plans. Congress blames the FCC for being too regulatory. The FCC companies for litigating

FCC rules and parts of the 1986 law need at opening phone markets to competition.

That law provides for local and long-distance companies to get into each other's businesses and gradually deregulate cable TV rules. Against the backdrop, some senior executives complain that carriers may never reap the

promised benefits of competition — more choices and lower prices — promised in the law. The law's supporters contend that in time they will find these on both sides of the issue agree that competition is not growing as quickly as the government had hoped.

Kennard was the FCC's general counsel. Furchtgott-Roth was chief economist for the House Commerce Committee. Powell, the son of retired Army Gen. Colin Powell, was chief of staff of the Justice Department's antitrust division. Tristani was a commissioner of the New Mexico agency that regulates utilities.

One decision they'll face is whether to approve individual Bell company requests to offer long-distance service in the same states where they provide local service. The FCC has rejected two such requests and a third, by BellSouth Corp., is pending.

The new FCC members also will decide what digital broadcast-

THURSDAY, OCT. 30, 1997 \$5

NZRO

Senate Approves New F.C.C. Chairman

WASHINGTON, Oct. 29 (Dow Jones) — The Senate gave approval today to President Clinton's choice to fill the top post at the Federal Communications Commission, but lawmakers vowed to keep a close eye on the agency as it continues pressing for competition in the telecommunications industry.

In a 99-to-1 vote, the Senate confirmed William E. Kennard as chairman of the agency. Mr. Kennard, 48, the general counsel for the F.C.C., replaces Reed E. Hundt.

The vote follows months of rancorous debate on Capitol Hill over the pace of deregulation under last year's sweeping telecommunications legislation. Lawmakers worry that their vision of competition is being clouded by mergers, higher rates for

consumers and new regulations.

Senator Conrad Burns, Republican of Montana, voted against the nominee, saying he feared that the F.C.C. would allow higher calling rates for rural telephone users.

Late on Tuesday, the Senate had cleared three other nominees for the five-member commission: Michael Powell, chief of staff at the Justice Department's antitrust division; Harold Furchtgott-Roth, an economist with the House Commerce Committee; and Gloria Tristani, a New Mexico state utilities regulator.

Several senators had expressed concerns about the nomination of Mr. Kennard, including Jesse Helms, the Republican from North Carolina, who questioned an F.C.C. decision to pull the construction permit of a radio station in Asheville, N.C. But Mr. Helms said his fears were allayed after meeting with Mr. Kennard earlier this month.

Radio applicants catch a break

A group of would-be radio broadcasters got some good news during last week's FCC Senate confirmation.

Discussing the plight of two dozen or so long-waiting radio applicants, senators voting on William Kennard's nomination as FCC chairman said they were confident the Kennard FCC will keep their channels off the auction block. And Senate Commerce Committee Chairman John McCain (R-Ariz.) had no objections to the plan.

"Mr. Kennard clearly feels the FCC can conduct hearings on this small group and class of applicants using new comparative criteria," Senator Jesse Helms (R-N.C.) said.

Helms has been championing the case of North Carolina broadcaster Zebulon Lee. Lee is one of some 25 radio applicants who had been close to securing radio licenses at the time that a court threw out the criteria which regulators had been using to select license winners when more than one company was vying for a station.



Helms is OK with Kennard.

The applications had been frozen at the FCC for more than three years when Congress this summer gave the commission authority to auction the pending licenses.

Some of the applicants have planned to take the commission to court if it auctions the radio channels. But FCC officials have doubted that they could assign licenses under the old comparative criteria and have the action stand up to court review. And developing new

comparative criteria has been so tricky that commission officials were close to proposing a plan to assign the pending broadcast licenses by lottery. Then Congress extended the FCC's auction authority and took away its power to hold the lotteries.

Helms, however, reviewed his meeting with Kennard and voiced confidence that the new FCC chairman will "work in good faith with me and others to resolve the problems the [court] decision caused." —Chris McConnell

United States Senate

WASHINGTON, DC 20510-3301

November 20, 1997

The Honorable Bob Smith, Chairman
The Honorable Harry Reid, Vice-Chairman
Senate Select Committee on Ethics
202 Hart Senate Office Building
Washington, D.C. 20510

Dear Messrs. Chairman and Vice-Chairman:

I am grateful for the opportunity to respond to the complaint filed on behalf of Biltmore Forest Radio, Inc. The complaint alleges that I violated, among other things, Senate Rule XLIII by making improper ex parte communications with the Federal Communications Commission.

Senate Rule XLIII addresses actions Senators and their staffs may properly take to assist their constituents, who, as you know, have a First Amendment right "to petition the government for a redress of grievances."

Recognizing that constituents often turn to their elected representatives to assist them in exercising this right, the Senate Ethics Manual, at p.223, further states that "[r]esponding to inquiries of petitioners and assisting them before executive or independent government officials and agencies is an appropriate exercise of the representational function of each Member of Congress, as well as an important function of congressional oversight." Indeed, in his 1954 book, Ethics in Government, Senator Paul Douglas noted that it is a legislator's obligation to work to correct injustices by public agencies and officials.

Last year I received several letters from constituents concerning the FCC's process of awarding broadcast licenses in the wake of the U.S. Court of Appeals' Bechtel decision. I forwarded some of the letters to the FCC and asked that the agency respond to their concerns. Senate Rule XLIII 2.(a) explicitly states that a Member of the Senate may communicate with an executive agency to "request information or a status report." Clearly, these communications lie within conduct

The Honorable Bob Smith, Chairman
The Honorable Harry Reid, Vice-Chairman
November 20, 1997
Page Two

allowed by Rule XLIII.

Rule XLIII also states that a Senator "may communicate with an executive or independent government official or agency on any matter" to, among other things, "express judgments" or "call for reconsideration of an administrative response which the Member believes is not reasonably supported by statutes, regulations or considerations of equity or public policy." That's precisely what Senator Faircloth and I did in our October 22, 1996 letter to then-FCC Chairman Reed E. Hundt: we expressed our judgment that the FCC's decision to revoke WZLS's license — and all other similarly situated and aggrieved stations' licenses — was unjustifiable and ought to be reconsidered.

Indeed, the current FCC Chairman apparently agreed with us when, in response to questions submitted to him on my behalf by Senator Burns before his confirmation, Mr. Kennard stated: "I do believe that the Bechtel decision has caused unfairness to many applicants who have had further processing of their applications delayed and, as a result of that court decision, will necessarily have their applications processed under new procedures. I am quite sympathetic to their predicament."

Irrespective of the merits of the FCC's actions in response to the Bechtel case, there clearly are serious questions of inequitable treatment of my constituents and others. For that reason, and pursuant to Rule XLIII, Senator Faircloth and I wrote the aforementioned October 22, 1996 letter to the FCC.

The complaint further alleges that I acted improperly by raising the issue of license allocation in light of the Bechtel decision in the context of the confirmation of William Kennard to be Chairman of the Federal Communications Commission. Notwithstanding Mr. Kennard's prior recusal from this case on July 15, 1997, the basis of this complaint amounts to little more than media characterizations of my conduct.

After his recusal from the WZLS matter, and before his confirmation, I met

The Honorable Bob Smith, Chairman
The Honorable Harry Reid, Vice-Chairman
November 20, 1997
Page Three

with Mr. Kennard to discuss, among other things, the difficulties of implementing the Bechtel decision. I appreciated Mr. Kennard's candor; and on the Senate floor I announced that I would vote for his confirmation, stating "I have been given assurances satisfactory to me by Mr. Kennard that he will, *within statute and regulation*, work in good faith with me and others to resolve the problems associated with the Bechtel decision."

At no point, either publicly or in my private conversations with Mr. Kennard, did I state that my support for his nomination depended on the outcome of any specific adjudication. Instead, I sought clarification and acknowledgment of the public policy issues raised by implementation of the Bechtel decision, a matter of great importance to not only one of my constituents, but to all those similarly situated.

In sum, I believe that my actions regarding this matter were well within the confines of Rule XLIII of the Senate, and I unequivocally deny all allegations of impropriety made against me by the complainant.

Sincerely,

A handwritten signature in dark ink, appearing to read "Jesse Helms". The signature is fluid and cursive, with a large initial "J" and a stylized "H".

JESSE HELMS:jb

Off the block

Some old analog applications could be spared from auction

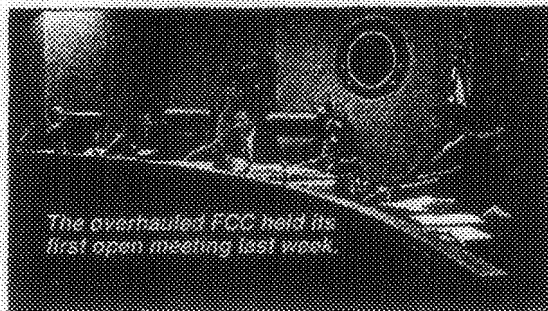
By Chris McConnell

The FCC is getting ready to auction analog TV and radio licenses. Except for a few.

Commissioners last week invited comment on whether the FCC should spare some pending licenses from the auction block. Implementing a law that gives the FCC new authority to auction analog broadcast licenses, commissioners asked whether about 20 of the older applications might be processed using a set of comparative criteria.

"I hope to get some useful comments on that issue," FCC Chairman William Kennard said of the license applicants who went through the FCC's old comparative hearing process but did not secure a license.

The old applications have been stuck at the FCC since 1993. That was when a court decision struck down the comparative hearing criteria that regulators had



The overhauled FCC held its first open meeting last week.

been using to choose license winners from among competing applications. Since then, some 1,243 radio and 462 TV applications have piled up at the FCC.

Earlier this year the issue threatened to stall Kennard's nomination as FCC chairman, after one North Carolina broadcaster caught in the holdup took his case to Senator Jesse Helms (R-N.C.). Helms gave Kennard's nomination a green light only after word from Kennard that the FCC's new auction author-

ity did not necessarily need to extend to all of the pending license applicants.

The North Carolina broadcaster, Zebulon Lee, is one of about 20 applicants who might now be exempted from the auctions. The commission asked whether it should develop a new set of comparative criteria for applications that had progressed through the hearing stage before the 1993 court ruling.

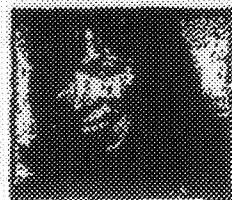
Other radio and TV licenses for which multiple applications were filed before July 1, 1997 would go on the auction block unless the parties settle their competing claims by Feb. 1.

The law requires the commission to use auctions to settle mutually exclusive applications filed after July 1. The auctions could begin in fourth quarter 1998.

The FCC also proposed seeking to promote minority and female ownership of broadcast licenses and invited comment on the use of bidding credits. Discussing the proposal, Kennard cited the negative impact of broadcast industry consolidation on minority and female ownership. ■

Judgment Day at the FCC

A federal court sharply criticizes the commission for its handling of the Orion/Lee radio case



In a tough and sharply worded ruling, a federal appeals court in Washington recently reversed the Federal Communications Commission's decision to take away veteran broadcaster Zebulon Lee's license to operate radio station WZLS-FM in Asheville, N.C. In its Dec. 19 opinion, the three-judge panel said that the FCC had ignored the public interest and its own recent precedents. The appeals court ordered the FCC to reinstate the 86-year-old Lee and his company, Orion Broadcasting, as the interim operators for the WZLS license.

Noting that the court only reverses an FCC decision if it is "arbitrary," "capricious," or "not in accordance with law," Judge David Ginsburg wrote: "The Commission's decisions in this case clearly fail to meet even this deferential standard."

The court ruled that Lee and Orion acted reasonably when they completed building their station and

file on the Orion matter suggested that the Highlands case not be raised in the FCC strategy because it could backfire. In interviews with *Mediaweek*, then FCC chief of staff Blair Levin said the Highlands case had no bearing on the Orion/Lee case and that the discovered memo was inconsequential. But the appeals court made it clear that the Highlands case was part of the FCC's undoing, when it shut down Lee, who was on the air and providing local service.

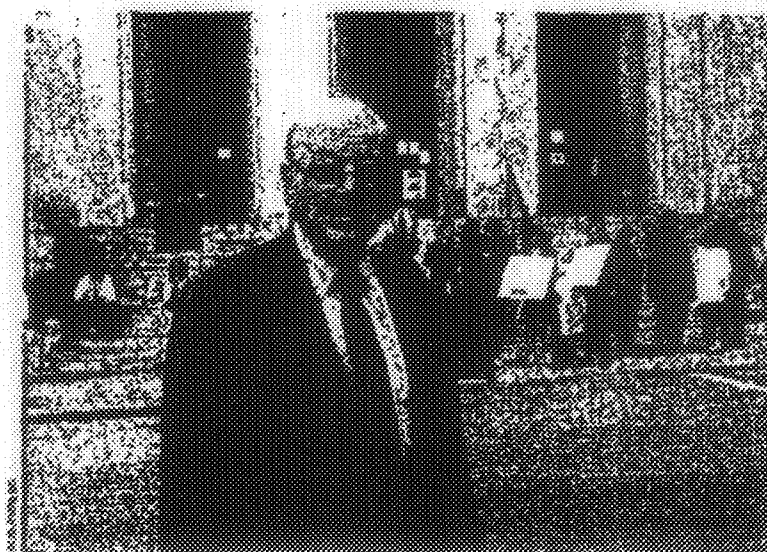
"The decision disrupted that service, in derogation of the very interest that the [FCC] had sought to protect when it permitted all other stations broadcasting as of August 4 [1994] to continue doing so," the court said.

The ownership dispute between Orion and the Biltmore Forest consortium (BFRI) was thrown into limbo along with dozens of other radio cases in 1994, when the same court ruled in the famous Bechtel case that the FCC's comparative standards for determining license awards were unfair. But in last month's decision, the appeals court strongly reprimanded the FCC for not explaining "why—or even whether—it thought BFRI would better serve the public's interest" in operating the Asheville station. The court noted that "three of the four applicants in the BFRI consortium had been rejected as licensees in one way or another for lack of integrity" by an administrative law judge. In interviews with *Mediaweek*, FCC lawyers had dismissed the relevance of the law judge's ruling.

The court also said that "the equities received short shrift" in the Lee case, adding that Orion had successfully defended its license for four years at the FCC and that Lee's investment in building the station weighed in his favor.

Betty Lee, Lee's wife and the station's vice president, was overcome when she heard the decision. "I am still crying," she said on the afternoon of Dec. 19. "It's the best Christmas present." She added that she, her husband, and their son Brian, the station manager, were all "very down this morning, before we all came to work." But as she talked, former staffers and well-wishers crowded into WZLS' offices and its silent broadcasting booths, yelping, hugging and singing Christmas carols.

One question that lingers is why the then FCC general counsel, William Kennard (now chairman of the commission), and his deputies reversed their own staff's four previous decisions favoring Orion and Lee. One of the owners at BFRI is a black Congressman, Mel Watt, (D-N.C.), a well-known party activist. When Kennard was undergoing hearings last fall to become the new FCC chairman, he denied that Watt's participation influenced his decisions. However, Kennard, who also is black, has stated strongly that he wants more minority ownership in broadcasting; BFRI says it is minority controlled. Lee is white. One of Lee's attorneys, Wright



Eyeing a comeback: Lee has asked the judges speed his return to WZLS.

went on the air in 1994, supported by several authorizations they had received from the FCC. The court said that when the FCC canceled Lee's interim license—after he had been on the air for almost three years—the action violated the precedent the commission had set in another matter, the Highlands case. The FCC's act, said the court, was "inconsistent with its own recent decision permitting another broadcaster to continue operating on an interim basis."

Last June, *Mediaweek* reported that a 1993 internal memo from the FCC general counsel's office that was accidentally placed in (and then removed from) the pub-

CERTIFICATE OF SERVICE

I, Stephen T. Velverton, an attorney, do hereby certify that on this 26th day of January, 1998, I have caused to be filed with the Secretary of the Federal Communications Commission an original and nine copies of the foregoing "Comments of Willstyr Communications, Limited Partnership," and copies were served on the following offices and interested persons:

Office of General Counsel
Federal Communications Commission
1919 M Street, N.W., Room 610
Washington, D.C. 20554

Audio Services Division
Mass Media Bureau
Federal Communications Commission
1919 M St., N.W., Room 302
Washington, D.C. 20554

Stephen C. Leckar, Esq.*
Wright H. Andrews, Esq.
Butera & Andrews
1301 Pennsylvania Ave., N.W.
Suite 500
Washington, D.C. 20004
Counsel for Orion Communications Limited

* Service by U.S. Mail

Service has also been made on
all other parties to MM Docket
No. 88-577


Stephen T. Velverton